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No. 01-1459

In the Supreme Court of the United States

KENNETH J. ELWOOD, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

SABRIJA RADONCIC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The certiorari petition demonstrates, and respondent does not dispute, the importance of the question presented in this case. The Third Circuit has held an Act of Congress unconstitutional. Each week, moreover, hundreds of additional criminal aliens come within the category of persons whom Congress required to be detained under 8 U.S.C. 1226(c) to ensure their removal from the United States and to protect the community against further crimes. See Pet. 16-17. Many of those mandatory detainees are aliens who, like respondent, entered the United States unlawfully and without inspection. The Third Circuit's decision in this case therefore bears upon the detention of thousands of aliens in removal proceedings, and it has immediate

importance for the status of all illegal aliens detained pursuant to Section 1226(c) at Immigration and Naturalization Service (INS) facilities within the Third Circuit.

The Third Circuit's decision in this case is all the more deserving of review because the court of appeals has extended the reasoning of *Patel* v. *Zemski*, 275 F.3d 299 (3d Cir. 2001), to aliens who have never been present legally in the United States. *Patel* involved the constitutionality of Section 1226(c) as applied to a lawful permanent resident alien—which is the subject of the pending petition in *DeMore* v. *Kim*, No. 01-1491 (filed Apr. 9, 2002). Granting the petition in this case, as well as in *Kim*, will enable the Court to address the constitutionality of Section 1226(c) in an important additional context and therefore will reduce the likelihood of future disagreements in the lower courts about the constitutionality of Section 1226(c). See Pet. 19-20. If the Court were to grant the petition in *Kim* without also granting review in a case involving an alien who is present in the United States unlawfully, future consideration by this Court of the constitutionality of Section 1226(c) as applied to illegal aliens might well prove necessary.

1. Respondent argues that certiorari should not be granted because the circuits are not in express disagreement about the constitutionality of Section 1226(c) as applied to aliens who entered the United States unlawfully, without inspection. See Br. in Opp. 6-8. That argument ignores the strong practical reason, discussed above, to grant review in this case as well as on the question presented in *Kim* (as to which the Circuits do expressly disagree, see Pet. 13-15).

The Seventh Circuit, moreover, has held that Section 1226(c) comports with due process as applied to a lawful

permanent resident whose "legal right to remain in the United States has come to an end" and who has "little hope" of avoiding removal to another nation. See *Parra* v. *Perryman*, 172 F.3d 954, 958 (1999). The protected due process rights of illegal aliens clearly are no greater than those of the lawful permanent resident in *Parra*. See Pet. 17; see also pp. 8-9, *infra*. Criminal aliens who entered the United States illegally also are less likely than criminal resident aliens to have a claim to relief from removal under the immigration laws. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 326 (2001) (holding that discretionary relief from removal is available to lawful permanent residents who would have been eligible for relief from deportation under 8 U.S.C. 1182(c) (1994) when they pleaded guilty to criminal offense). It therefore follows *a fortiori* that detention of an illegal entrant during the pendency of removal proceedings is lawful in the Seventh Circuit, at least if the alien has no viable claim to relief from removal. The holding of the Third Circuit in this case—that respondent was entitled to an individualized bond hearing without regard to his illegal entry or likelihood of obtaining relief from removal—thus puts the Third Circuit at odds with the Seventh Circuit. See Pet. 15-16.[1]

Respondent also argues that the question of the constitutionality of Section 1226(c) was moot in *Parra* because Parra was subject to a final order of removal and, therefore, the Seventh Circuit's holding should be

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[1] Consistent with *Parra*, respondent appears to acknowledge that mandatory detention of an alien who entered the United States illegally is permissible when removability is not contested. See Br. in Opp. 8. The court of appeals, however, did not condition its extension of *Patel* to illegal entrants upon respondent's attempts to avoid removal.

treated as dictum. Br. in Opp. 6. The Seventh Circuit, however, decided the case on the basis that Parra was *not* subject to a final order of removal (172 F.3d at 956) and was being detained under Section 1226(c) "pending the conclusion of removal proceedings" (*id.* at 955). Thus, the Seventh Circuit squarely held that Section 1226(c) "plainly is within the power of Congress." *Id.* at 958.

2. Respondent agrees with the government that this case "is not moot."[2] Br. in Opp. 11; see Pet. 21. He notes, however, that the case might become moot if his efforts to obtain judicial or administrative relief from removal are unsuccessful. *Ibid.* The petition notes that possibility (Pet. 20-21), but also explains (Pet. 20) that a possibility of mootness is inherent in all challenges to detention under Section 1226(c), and that this possibility counsels in favor of granting certiorari and hearing oral argument in *both* this case and *Kim*.

Respondent further suggests that there is a "question" whether the detention controversy in this case terminated when an IJ released respondent on bond in

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[2] Respondent is incorrect when he claims (Br. in Opp. 3-4) that, but for the district court's habeas corpus order and the court of appeals' affirmance of it, he *currently* would be detained under Section 1226(c). The INS has interpreted 8 U.S.C. 1231(a) (governing detention after a final order of removal) as applying to an alien whose final administrative removal order has been stayed by the court of appeals, although in the event of such a stay the 90-day removal period does not begin to run until the court enters its final order, see 8 U.S.C. 1231(a)(1)(B)(ii). But see *Bejjani* v. *INS*, 271 F.3d 670, 689 (6th Cir. 2001). That issue has no relevance for respondent's case, however. The parties agree that respondent is or was subject to detention under Section 1226(c) and that this case did not become moot when, in November 2001, the Board affirmed the removal order issued by the immigration judge (IJ). See Pet. App. 18a-21a (Board order).

compliance with the district court's habeas corpus order. Br. in Opp. 11. When a "defendant has merely submitted to perform the judgment of the court," he generally "[does] not thereby los[e] his right to seek a reversal of that judgment by writ of error or appeal." *Mancusi* v. *Stubbs*, 408 U.S. 204, 207 (1972) (quoting *Dakota County* v. *Glidden*, 113 U.S. 222, 224 (1885)). Moreover, if this Court grants the petition and reverses the judgment of the court of appeals, then the INS will be able to move to vacate the IJ's bond order and take respondent back into custody under Section 1226(c) if respondent is again put in removal proceedings. See Pet. 21 (discussing possible reopening of administrative proceedings). The government's injury from the district court's habeas corpus order therefore would be redressed by a favorable judicial decision, notwithstanding that respondent was released on bond under the terms of the district court's order. See *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990); see also *Kim* v. *Ziglar*, 276 F.3d 523, 526 (9th Cir. 2002) ("Although Kim is no longer in custody, the case continues to present a live controversy because the INS states that it will take Kim into custody and hold him without bail if we reverse."), petition for cert. pending, No. 01-1491 (filed Apr. 9, 2002).

3. Respondent makes three additional, case-specific arguments against review of the Third Circuit's decision.

a. Respondent suggests (Br. in Opp. 4, 11-12) that—although he was convicted in 1999 of alien smuggling, which he concedes (*id.* at 11-12) is an aggravated felony that triggers Section 1226(c), see Pet. 11—he should not have been detained under Section 1226(c) because the INS did not list the federal conviction as specific grounds for his deportation, see Pet. 5, 6-7. That

argument was not presented to or passed upon by the court of appeals, and it therefore is not a proper ground on which to defend the court of appeals' judgment. See *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994) (respondent may "defend a judgment on any ground *properly raised below*") (emphasis added); see also *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479 (1999). Respondent also fails to note that, in August 1996, the INS charged respondent with being deportable under 8 U.S.C. 1251(a)(1)(E)(i) (1994), based upon the alien-smuggling prosecution.[3] See Pet. 6-7; see also Br. in Opp. 4 (agreeing with facts stated in petition).

Moreover, the applicability of Section 1226(c) does not depend upon the INS's charges against the alien. Section 1226(c) requires detention of an alien who "is deportable" for having committed an aggravated felony. The Board has held (contrary to respondent's assertion, see Br. in Opp. 4) that the class of aliens covered by this language is *not* limited to aliens whom the INS has charged with being deportable on that ground. See *In re Modesto Adalberto MELO-Pena*, 21 I. & N. Dec. 883, 884-885 & n.2 (BIA 1997) (interpreting "is deportable" in context of custody during removal proceedings and distinguishing *In re Ching*, 12 I. & N. Dec. 710 (BIA 1968), upon which respondent relies).

b. Respondent asserts (Br. in Opp. 5) that the Third Circuit's *Patel* decision is "*stare decisis*" for purposes of this case. In *Kim*, the government has sought certio-

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[3] The Board did not base respondent's final order of removal upon the alien-smuggling charge. See Pet. App. 18a n.1. That charge nevertheless was before the Board during the administrative removal proceedings, and the Board relied upon respondent's alien-smuggling conviction in its decision. See Pet. App. 19a.

rari on the same issue presented in *Patel*: Whether the mandatory detention provisions of 8 U.S.C. 1226(c) satisfy the requirements of due process as applied to a criminal alien who is a lawful permanent resident of the United States. The petition in this case explains (Pet. 20 n.10, 22 n.11) that *Patel* presented serious mootness concerns that made it an unsuitable vehicle for this Court's consideration of that question. If this Court reverses the Ninth Circuit's judgment in *Kim*, however, *Patel* will be superseded. Furthermore, the vitality of *Patel* as Third Circuit precedent says nothing about whether the Third Circuit correctly extended *Patel* to invalidate the mandatory detention of respondent (who, unlike Patel, entered the country illegally and was never granted permanent resident status).

c. Respondent suggests that the Third Circuit's failure to publish its decision in the Federal Reporter is an obstacle to review by this Court. Br. in Opp. 4-5, 7. If the Third Circuit's decision not to publish turned on its view that "the legal issue [in this case] is the same" as in *Patel* (Pet. App. 5a), then the court of appeals' reasoning was incorrect. See Pet. 17. But regardless of the court of appeals' rationale for not publishing, the unpublished nature of the court of appeals' decision does not affect the decision's finality or moot the controversy between the parties. This Court commonly grants certiorari to review an unpublished decision of a federal court of appeals. See, *e.g.*, *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001); *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 430 (2001); *Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 269 (2001) (per curiam); *Eastern Assoc. Coal Corp.* v. *United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 61 (2000).

4. On the merits of the due process issue, respondent argues that his detention under Section 1226(c) should be deemed an impermissible criminal penalty, rather than analyzed as civil detention. See Br. in Opp. 2, 3, 9-11. Respondent appears to recognize (*id.* at 9, 10) that his argument is inconsistent with the reasoning of *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001), in which this Court treated detention after a final order of removal as civil, not criminal, in nature. So too, the Third Circuit held in *Patel* that Section 1226(c) is civil in nature, 275 F.3d at 311, and its holding was incorporated into the Third Circuit's decision in this case, see Pet. App. 5a-6a. As the court of appeals correctly held in *Patel*:

> The power to deport necessarily encompasses the power to detain. Thus, the detention mandated in [Section 1226(c)] is regulatory and not punitive. *See Carlson*[v. *Landon*, 342 U.S. 524, 537-538 (1952)] ("Deportation is not a criminal proceeding and has never been held to be punishment. . . . Detention is necessarily a part of this deportation procedure.").

275 F.3d at 310-311; see *United States* v. *Salerno*, 481 U.S. 739, 747 (1987) ("Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.") (internal quotation marks and brackets omitted).

Respondent also appears to dispute that aliens who entered the United States unlawfully are entitled to lesser due process protection in connection with their removal proceedings than lawful permanent resident

aliens. Br. in Opp. 8, 10. Indeed, respondent seems to contend that all aliens who enter the United States (whether legally or illegally, temporarily or permanently) must be treated alike when weighing the relevant factors in the due process analysis. *Id.* at 10. Those arguments are contrary to both common sense and this Court's decisions. See *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien *gains admission* to our country and *begins to develop the ties that go with permanent residence*, his constitutional status changes accordingly.") (emphasis added); *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.").[4]

Finally, respondent suggests that the governmental interest in detaining a particular alien must always be determined in an individualized bond hearing. See Br. in Opp. 2, 10. Respondent here ignores Congress's legislative powers to classify aliens and to regulate their admission and removal, see *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982), as well as the record of failed efforts to deport non-detained criminal aliens that Congress confronted when it drafted Section 1226(c). See Pet. 1-4, 17-19; see also *Kim* Pet. 14-19. Under respondent's proposed due process rule, the judgment of an individual IJ or a court about matters such as the importance

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[4] Nor does this case turn upon whether respondent is deemed a "person" for due process purposes. See Br. in Opp. 1-2, 8; cf. *Plyler* v. *Doe*, 457 U.S. 202, 210-212 (1982). The question, rather, is what "process" is "due" in connection with removal proceedings involving an alien who entered the United States illegally and committed an aggravated felony while illegally present in the country.

of ensuring an aggravated felon's availability for removal would trump the legislative judgment of Congress. That would be a radical departure from this Court's historical approach to statutes bearing upon the removal of aliens. See, *e.g.*, *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Plyler*, 457 U.S. at 225 ("Congress has developed a complex scheme governing admission to our Nation and status within our borders. The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field.") (citations omitted).

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The petition for a writ of certiorari should be granted and the case should be set for oral argument in tandem with, or be consolidated for oral argument with, *DeMore* v. *Kim*, petition for cert. pending, No. 01-1491 (filed Apr. 9, 2002).

Respectfully submitted.

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